

# A Faulty Rethinking of the 2nd Amendment

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STANFORD, Calif. - The Bush administration has found a constitutional right it wants to expand. Attorney General John D. Ashcroft attracted only mild interest a year ago when he told the National Rifle Association, "The text and original intent of the Second Amendment clearly protect the right of individuals to keep and bear firearms."

Now, briefs just filed by Solicitor General Theodore Olson in two cases currently being appealed to the Supreme Court indicate that Mr. Ashcroft's personal opinion has become that of the United States government. This posture represents an astonishing challenge to the long-settled doctrine that the right to bear arms protected by the Second Amendment is closely tied to membership in the militia.

It is no secret that controversy about the meaning of the amendment has escalated in recent years. As evidence grew that a significant portion of the American electorate favored the regulation of firearms, the N.R.A. and its allies insisted ever more vehemently that the private right to possess arms is a constitutional absolute. This opinion, once seen as marginal, has become an article of faith on the right, and Republican politicians have in turn had to acknowledge its force.

The two cases under appeal do not offer an ideal test of the administration's new views. One concerns a man charged with violating a federal statute prohibiting individuals under domestic violence restraining orders from carrying guns; the other involves a man convicted of owning machine guns, which is illegal under federal law. In both cases, the defendants cite the Second Amendment as protecting their right to have the firearms. The unsavory facts may explain why Mr. Olson is using these cases as vehicles to announce the administration's constitutional position while urging the Supreme Court not to accept the appeals.

The court last examined this issue in 1939 in *United States v. Miller*. There it held that the Second Amendment was designed to ensure the effectiveness of the militia, not to guarantee a private right to possess firearms. The *Miller* case, though it did not fully explore the entire constitutional history, has guided the government's position on firearm issues for the past six decades.

If the court were to take up the two cases on appeal, it is far from clear that the Justice Department's new position would prevail. The plain text of the Second Amendment -- "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed" -- does not support the unequivocal view that Mr. Ashcroft and Mr. Olson have put forth. The amendment refers to the right of the people, rather than the individual person of the Fifth Amendment. And the phrase "keep and bear arms" is, as most commentators note, a military reference.

Nor do the debates surrounding the adoption of the amendment support the idea that the

framers were thinking of an individual right to own arms. The relevant proposals offered by the state ratification conventions of 1787-88 all dealt with the need to preserve the militia as an alternative to a standing army. The only recorded discussion of the amendment in the House of Representatives concerned whether religious dissenters should be compelled to serve in the militia. And in 1789, the Senate deleted one clause explicitly defining the militia as "composed of the body of the people." In excising this phrase, the Senate gave "militia" a narrower meaning than it otherwise had, thereby making the Ashcroft interpretation harder to sustain.

Advocates of the individual right respond to these objections in three ways.

They argue, first, that when Americans used the word militia, they ordinarily meant the entire adult male population capable of bearing arms. But Article I of the Constitution defines the militia as an institution under the joint regulation of the national and state governments, and the debates of 1787-89 do not demonstrate that the framers believed that the militia should forever be synonymous with the entire population.

A second argument revolves around the definition of "the people." Those on the N.R.A. side believe "the people" means "all persons." But in Article I we also read that the people will elect the House of Representatives -- and the determination of who can vote will be left to state law, in just the way that militia service would remain subject to Congressional and state regulation.

The third argument addresses the critical phrase deleted in the Senate. Rather than concede that the Senate knew what it was doing, these commentators contend that the deletion was more a matter of careless editing.

This argument is faulty because legal interpretation generally assumes that lawmakers act with clear purpose. More important, the Senate that made this critical deletion was dominated by Federalists who were skeptical of the militia's performance during the Revolutionary War and opposed to the idea that the future of American defense lay with the militia rather than a regular army. They had sound reasons not to commit the national government to supporting a mass militia, and thus to prefer a phrasing implying that the militia need not embrace the entire adult male population if Congress had good reason to require otherwise. The evidence of text and history makes it very hard to argue for an expansive individual right to keep arms.

There is one striking curiosity to the Bush administration's advancing its position at this time. Advocates of the individual-right interpretation typically argue that an armed populace is the best defense against the tyranny of our own government. And yet the Bush administration seems quite willing to compromise essential civil liberties in the name of security. It is sobering to think that the constitutional right the administration values so highly is the right to bear arms, that peculiar product of an obsolete debate over the danger of standing armies -- and this at a time when our standing army is the most powerful the world has known.

